

MUI Finance Bhd v Pendaftar Hakmilik, Shah Alam & Anor

HIGH COURT (SHAH ALAM) — ORIGINATING MOTION NO 21-30 OF 1992

MAHADEV SHANKAR J

30 JULY 1992

Land Law — *Caveat* — Registrar's caveat lodged to secure claim of Department of Inland Revenue for arrears of income tax — Caveat entered after charges registered in respect of land — Right of chargee for removal of registrar's caveat — Whether court empowered to give directions sought by the Director General of Inland Revenue — National Land Code 1965 ss 320(1)(ba), 321(3) & 417 — Income Tax Act 1967 Pt VII, ss 103, 106(1), 106(3) & 142(1)

Revenue Law — Order for the sale or disposition of taxpayers' property — Power to obtain — Income Tax Act 1967 Pt VII, ss 103, 106(1), 106(3) & 142(1) — Rules of the High Court 1980 O 47 rr 6 & 7

The applicant was the registered chargees of two lots of land to secure two loans granted by them in the sum of RM470,000. The loan was subsequently reduced to RM367,216.15 ('the redemption sum'). The registered proprietors applied to the Public Bank ('the bank') for a term loan of RM350,000 and an overdraft of RM200,000 offering the same land as security. This money was to be utilized to pay the redemption sum and the balance was to be paid to the registered proprietors. The bank paid the redemption sum to the applicant subject to a condition precedent that the two charges be first discharged by the applicant. The discharge of charges was not possible because the registrar had filed a registrar's caveat at the instance of the Director General of Inland Revenue, the second respondent, to secure the arrears of tax owed by the registered proprietors of the land. The applicant therefore filed an application for the removal of the registrar's caveat. The second respondent objected to the removal of the caveat. If the court was minded to remove the caveat, the second respondent applied for an order that the said land should not be permitted to be charged to any other party until the tax due has been paid; alternatively, for an order that the land be sold to settle the debts of the applicant and the second respondent; or in the further alternative, that the claim be dismissed with costs and the caveat be perpetuated until the second respondent's debts are paid in such a manner as not to cause any loss to the applicant or the bank.

Held, dismissing the application:

- (1) The applicant does not have any right under s 321(3) of the National Land Code 1965 to apply for cancellation of a registrar's caveat. Only the registered proprietor can do that, or the registrar on his own motion.

- A (2) The court is not empowered under s 320(1)(ba) to enable the Department of Inland Revenue to obtain orders for the sale or disposition of a taxpayer's property or alternatively, for the caveat to be lifted just to permit the registration of the memorandum of discharge and then be immediately reimposed to take priority over the charge to the bank.
- B (3) The purpose of s 320(1)(ba) is nothing more than to give the government an expeditious way of effecting an attachment before judgment for the tax due and payable. Once the caveat has been filed it behoves the revenue to take timeous action to obtain judgment and enforce it.

C

[Bahasa Malaysia summary]

- D Pemohon adalah pemegang gadaian yang berdaftar bagi dua lot tanah untuk menjamin dua pinjaman yang diberi oleh mereka berjumlah RM470,000. Pinjaman itu kemudiannya dikurangkan kepada RM367,216.15 ('wang penebusan itu'). Pemilik yang berdaftar telah memohon kepada Public Bank ('bank itu') untuk pinjaman bertempoh sebanyak RM350,000 dan suatu overdraf sebanyak RM200,000 menawar tanah yang sama sebagai cagaran. Wang itu hendak digunakan untuk membayar wang penebusan itu dan bakinya dibayar kepada pemilik yang berdaftar. Bank itu telah membayar wang penebusan itu kepada pemohon tertakluk kepada syarat terdahulu bahawa kedua-dua gadaian dilepaskan terlebih dahulu oleh pemohon. Pelepasan gadaian itu tidak dapat dilaksanakan kerana pendaftar telah memfailkan suatu kaveat pendaftar atas permintaan Ketua Pengarah Jabatan Hasil Dalam Negeri, penentang kedua, untuk mendapat tunggakan cukai yang dihutang oleh pemilik berdaftar tanah itu. Oleh itu, pemohon telah memfailkan suatu permohonan untuk pembatalan kaveat pendaftar itu. Penentang kedua telah membantah pembatalan kaveat itu. Jika mahkamah berhasrat membatalkan kaveat itu, penentang kedua memohon untuk suatu perintah supaya tanah itu tidak dibenarkan digadai kepada pihak lain sehingga tunggakan cukai dibayar; sebagai alternatif, untuk suatu perintah supaya tanah itu dijual untuk menyelesaikan hutang pemohon dan penentang kedua, atau sebagai alternatif tambahan bahawa tuntutan itu ditolak dengan kos dan kaveat dikekalkan sehingga hutang penentang kedua dibayar sebegitu cara supaya tidak menyebabkan sebarang kerugian kepada pemohon atau bank itu.
- E
- F
- G
- H

Diputuskan, menolak permohonan itu:

- I (1) Pemohon itu tidak mempunyai hak di bawah s 321(3) Kanun Tanah Negara 1965 untuk memohon supaya kaveat pendaftar dibatalkan. Hanya pemilik yang berdaftar boleh membuat demikian, atau pendaftar atas perbuatannya sendiri.
- (2) Mahkamah tidak diberi kuasa di bawah s 320(1)(ba) untuk membenarkan Jabatan Hasil Dalam Negeri untuk mendapat perintah supaya harta pembayar cukai dijual atau dilupuskan atau sebagai alternatif, supaya kaveat itu diselak untuk membenarkan pen-

daftar memorandum pelepasan dan kemudiannya dikenakan semula dengan segera supaya mendapat keutamaan keatas gadaian kepada bank itu.

- (3) Tujuan s 320(1)(ba) hanya setakat memberi kerajaan suatu cara yang cepat dan cekap untuk melaksanakan suatu penahan sebelum penghakiman untuk cukai yang perlu dibayar. Sebaik sahaja kaveat itu difailkan jabatan hasil sepatutnya bertindak dengan cepat untuk mendapat penghakiman dan menguatkuasakannya.]

Cases referred to

- 1 *Oversea-Chinese Banking Corp Ltd v Pendaftar Hakmilik, Negeri Kedah* [1990] 2 MLJ 478; [1991] 2 MLJ 177 (SC) (distd)
- 2 *Development and Commercial Bank Bhd v Land Administrator, Wilayah Persekutuan & Anor* [1991] 2 MLJ 180 (distd)
- 3 *MBF Finance Bhd v Pendaftar Hakmilik Negeri Perak & Anor* [1990] 3 MLJ 437 (refd)
- 4 *Government of Malaysia & Anor v Jagdis Singh* [1987] 2 MLJ 185 (refd)
- 5 *Re Preston* [1985] 2 WLR 836 (refd)

Legislation referred to

Income Tax Act 1967 Part VII ss 103, 106(1), 106(3) & 142(1)
National Land Code 1965 ss 320(1)(ba)

LS Ng (Sothi & Ang) for the applicant.

Salehuddin (Assistant State Legal Advisor) for the first respondent.

Mohd Bazian (Senior Federal Counsel) for the second respondent.

Cur Adv Vult

Shankar J: On 14 April 1987, Chin Fook Cheong ('Chin') and Hong Lay Hwa ('Hong') charged two lots of land ('the land') held under separate titles ('the titles') to the applicant ('MUI'). It was to secure a loan of RM400,000. They created a second charge over the said land on 25 March 1989. This was to secure an additional loan of RM70,000.

By 1991, the loan had been reduced to RM367,216.15 ('the redemption sum'). Chin and Hong had applied to the Public Bank ('the bank') for a term loan of RM350,000 and an overdraft of RM200,000 offering the said land as security. This money was to be utilized to pay the redemption sum, and the balance of RM182,784 to be paid to Chin and Hong for renovations to their house. The bank paid the redemption sum to MUI subject to a condition precedent that the two charges aforesaid be first discharged by MUI.

This MUI was unable to do because the way ahead was blocked by a registrar's caveat filed by the first respondent ('the registrar') at the instance of the second respondent, the Director General of Inland Revenue ('the DGIR'). It is not clear from the affidavits before me whether the registrar notified Chin and Hong, or MUI of the lodgement of the caveat. MUI's

A attorney swears that they only got to know of the caveat from the bank when the latter told them their memorandum of discharge could not be registered.

So MUI filed this application. Significantly, Chin is not a party to this application. Nor is Hong, even though she is not the nominal taxpayer. The bank has not been joined, but it is a safe inference that Chin and Hong must have executed a charge in favour of the bank and that those documents
B must have been simultaneously presented with the memorandum of discharge and the titles. MUI's solicitors however have not canvassed the interest of the bank to have its fresh charge simultaneously registered if the registrar's caveat is removed.

The DGIR alleges that between 1981 and 1990, Chin did not declare his true income. By a letter dated 27 July 1991, the DGIR required the registrar to put in a caveat to secure payment of back taxes for these years amounting to RM191,036.91.
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The bank manager had informed the DGIR that the first title was valued at RM600,000 and the second title at RM100,000. If sold at these values, there would be a balance of RM332,784 after payment of the redemption sum.
D

The DGIR objects to the removal of the registrar's caveat. If the court was minded to remove the caveat, the DGIR prays for an order that the said land should not be permitted to be charged to any other party until the tax due has first been paid, and alternatively for an order that the land be sold to settle the debts of MUI and the respondents or in the further alternative that the claim be dismissed with costs and the caveat be perpetuated until the respondents debts are paid in such a manner as not to cause any loss to MUI or the bank.
E

Whether any of these reliefs are available turns on a proper construction of s 320(1)(ba) of the National Land Code 1965 ('the NLC'), which was considered in great depth in the first instance by my brother YA KC Vohrah in *Oversea-Chinese Banking Corp Ltd v Pendaftar Hakmilik, Negeri Kedah*¹ and subsequently on appeal to the Supreme Court ('the OCBC case') where the judgment was delivered by YA Gunn Chit Tuan SCJ [as he then was]. The same quorum jointly heard another appeal in *Development and Commercial Bank Bhd v Land Administrator Wilayah Persekutuan*² ('the D & C Bank case').
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A cursory reading of *MBF Finance Bhd v Pendaftar Hakmilik Negeri Perak & Anor*³ would suggest that the mere existence of a prior registered charge on a land would preclude the registrar from lodging a registrar's caveat since this would in effect clog the prior rights of the chargee. The question as to whether there would be a possible surplus for the revenue if the land was sold was not gone into.
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The two Supreme Court decisions aforesaid however, made it clear that the existence of a prior registered charge does not preclude the registrar from lodging a caveat, but that the value of the land, the size of the debt owed to the chargee, and the amount of the tax payable are material considerations. If it is obvious that the value of the land will be insufficient to pay the chargee, it appears that the caveat can be challenged.
I

In the OCBC case,¹ the bank had already obtained a court order for the sale by public auction when it discovered the registrar's caveat. In the D & C Bank case,² a sale was in the offing but could not be put through.

In the case before me, neither MUI nor the bank nor Chin and Hong contemplated a sale of the said land and it is problematical to what extent the court can go to realize the objectives of s 320(1)(ba) of the NLC.

In so far as MUI is concerned, s 321(3) of the NLC does not give the chargee any rights to apply for cancellation of a registrar's caveat. Only the registered proprietor can do that, or the registrar himself of his own motion. (See also the *D & C Bank* case² especially at p 183 right-hand col at F.) MUI can apply for a declaration but to what purpose?

If they want to keep the redemption sum, the charges to them must not only be discharged but the new charge to the bank has also to be registered. MUI does not say so but the inference is clearly open that they have cast themselves in the role of the trojan horse. If they succeed in this application, the bank will step in and supplant the interests of the revenue.

This would defeat the very object for which the section was passed. Can the court then go further and make the mandatory orders requested by the revenue? The other parties may not wish to sell.

By the Income Tax Act 1967, tax payable under a notice of assessment shall be due and payable at the place specified. (See Pt VII of the Act and especially s 103). By s 106(1), tax due and payable must be recovered by civil proceedings as a debt due to the government. By s 106(3), the court cannot entertain any plea that the assessment is incorrect or under appeal. By s 142(1), a certificate by the director general is sufficient evidence for the court to give judgment for that amount. (See also *Government of Malaysia & Anor v Jagdis Singh*⁴ and *Re Preston*.⁵)

However, nowhere have I come across any provision which entitles the revenue to obtain orders for the sale or disposition of a taxpayer's property merely because assessments have been issued and not complied with. Such an entitlement will undoubtedly arise after judgment and the issue of a writ of seizure and sale: See Rules of the High Court O 47 rr 6 and 7.

I hold that s 320(1)(ba) does not empower this court to give directions of the kind envisaged by the revenue, so that a forced sale can be carried out at this stage, or alternatively for the caveat to be lifted just to permit the registration of the memorandum of discharge, and then be immediately reimposed to take priority over the charge to the bank.

The purpose of s 320(1)(ba) in my view is nothing more than to give the government an expeditious way of effecting an attachment before judgment for tax due and payable. Once the caveat has been filed it behoves the revenue to take timeous action to obtain judgment and enforce it as provided by the rules of the court.

It is premature at this stage to go into the value of the land or the debt or the tax payable because the taxpayer may have other resources to settle these liabilities. What matters is that the revenue is aware of this asset and is entitled to attach it.

Consequently, the only order I can make in this matter is to dismiss MUI's application with costs.

Application dismissed.